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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re N. D., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. N. D., Defendant and Appellant.	F053397 (Super. Ct. No. 05CEJ601315-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Martin Suits, Commissioner.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Brian Alvarez and Leanne L. LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II and III.

The main issue in this case concerns amendments to Welfare and Institutions Code sections 731 and 733 that took effect on September 1, 2007.[1] Under these amendments, a juvenile court can commit a ward to the Division of Juvenile Facilities (DJF) (formerly the California Youth Authority) only if the petition upon which the ward is committed is for certain enumerated offenses. We hold that these amendments do not apply to a disposition that occurred before September 1, 2007. The common-law rule requiring application of statutes that mitigate punishment to all cases not yet final on their effective dates is inapplicable. The amendments did not *mitigate* punishment, but only limited the places in which a ward can be confined. Since the juvenile court committed minor N. D. to the DJF before September 1, 2007, he is not entitled to reversal of the commitment.

In the unpublished portion of this opinion, we conclude that it is unnecessary to reach N. D.'s contention that another recently enacted law, section 731.1, is unconstitutional. Finally, we reject N. D.'s claim that the juvenile court abused its discretion in committing him to the DJF. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

N. D., then 15 years old, entered a garage in Fresno and took a bicycle on September 17, 2005. The district attorney filed a juvenile wardship petition pursuant to section 602 alleging one felony count of first degree burglary. (Pen. Code, § 459.) The juvenile court found the allegation true based on N. D.'s admission and determined that the maximum period of confinement was six years. The court deferred entry of judgment pursuant to section 790.

Within less than three months, N. D. was found in possession of marijuana at school on November 14, 2005, and again on December 1, 2005. The district attorney filed a wardship petition alleging two misdemeanor counts of possessing marijuana on

[1]Subsequent statutory references are to the Welfare and Institutions Code unless noted otherwise.

school grounds. (Health & Saf. Code, § 11357, subd. (e).) N. D. admitted to one count, and the court terminated his deferred-entry-of-judgment status. It imposed probation and committed him to the Elkhorn Correctional Facility boot camp for a period not to exceed 365 days. N. D. entered the boot camp program on April 28, 2006.

On December 6, 2006, the probation officer filed a petition in the juvenile court pursuant to section 777 alleging that, while in boot camp, N. D. committed numerous violations of the terms of his probation. He repeatedly violated the boot camp's rules, refused to follow staff instructions, and admitted to making a canteen of pruno, a homemade fermented drink. A probation report supporting the petition stated, among other things, that N. D. admitted to using drugs while at home on a pass and absconded while on another pass. After N. D. admitted to the court that he made the pruno, the court removed him from the boot camp program. It committed him to the Elkhorn Correctional Facility Delta program or, if N. D. failed the required mental and physical screenings, to the Juvenile Justice Campus. N. D. was found to be ineligible for the Delta program because he was taking psychotropic medication.

On January 31, 2007, while in a classroom at the Juvenile Justice Campus, N. D. hit another ward in the face. The victim did not know N. D. N. D. explained that the victim had been "'mean mugging'" him. The district attorney filed a wardship petition alleging a misdemeanor battery on school property. (Pen. Code, § 243.2, subd. (a)(1).) N. D. admitted to simple misdemeanor battery. (Pen. Code, § 242.)

The probation officer, stating that a DJF commitment would be premature, recommended that the court impose an extended commitment to the Juvenile Justice Campus. The court's view, however, was that the battery showed N. D. was a danger to the other wards, and his history as described in the probation report showed he had failed to respond to less-restrictive placements. It committed him to DJF[2] and stated that the

[2]The court actually used the name California Youth Authority (CYA). The CYA was renamed California Department of Corrections and Rehabilitation, Juvenile Justice,

maximum period of confinement was six years two months, consisting of six years for the burglary and two months for the battery.

DISCUSSION

I. Amended sections 731 and 733

N. D. committed his latest offense, the battery, on January 31, 2007. On April 26, 2007, the court accepted N. D.'s admission that he committed battery and committed him to DJF on May 30, 2007. On September 1, 2007, amendments to sections 731 and 733 took effect. (Stats. 2007, ch. 175, §§ 19, 22, 37.) Section 731 provides that the juvenile court can commit a ward to DJF "if the ward has committed an offense described in subdivision (b) of Section 707 and is not otherwise ineligible for commitment to the division under Section 733." Section 733 provides that a ward of the juvenile court shall not be committed to DJF if "the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code." None of the offenses alleged in any of the petitions against N. D. were described in section 707, subdivision (b), and none were sex offenses. N. D. argues that the amendments should apply to him—and his DJF commitment therefore should be reversed—because his case was still pending on appeal when the amendments took effect.

His argument is based on a common-law doctrine embraced by the California Supreme Court in *In re Estrada* (1965) 63 Cal.2d 740. In June of 1963, Estrada escaped from the California Rehabilitation Center. In September of that year, statutory amendments became effective under which the minimum pre-parole sentence for a

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effective July 1, 2005. The Division of Juvenile Facilities (DJF) is part of the Division of Juvenile Justice. (Gov. Code, §§ 12838, 12838.3, 12838.5, 12838.13.) DJF is referenced in statutes, such as sections 731 and 733, that formerly referred to CYA. In this opinion we will use the name DJF uniformly, even when referring to older cases and statutes.

nonviolent escape was reduced. In October, Estrada was convicted of escape. After he was captured and returned and the addiction proceedings terminated, the Adult Authority continued to hold him pursuant to the former law on escapes. (*Id*. at pp. 742-743.) In a habeas corpus proceeding, the Supreme Court ordered Estrada's sentence for escape to be fixed as provided in the amended statutes. (*Id.* at p. 751.) The court explained:

> "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*In re Estrada, supra*, 63 Cal.2d at p. 745.)

The Legislature can provide the contrary by including a saving clause if it wishes. The rule, therefore, is this: "[W]here the amendatory statute mitigates punishment and there is no saving clause, … the amendment will operate retroactively so that the lighter punishment is imposed" in all cases in which judgment was not yet final when the amendment took effect. (*In re Estrada, supra*, 63 Cal.2d at p. 748.) Cases in which judgment is not yet final include those in which a conviction has been entered and sentence imposed but an appeal is pending when the amendment becomes effective. (*People v. Babylon* (1985) 39 Cal.3d 719, 722; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 70.) The *Estrada* rule has been applied to juvenile delinquency judgments. (*In re Aaron N.* (1977) 70 Cal.App.3d 931, 938.)

We hold that the rule of *Estrada* does not apply to this case. The amendments to sections 731 and 733 do not mitigate any punishment, for they do not reduce the amount of time any juvenile offender is confined. Instead, they limit the places in which juveniles committing certain offenses can be confined. Nothing in the statutes indicates an intention on the part of the Legislature to reduce the severity of punishment for any

offense. The parties have not pointed to anything in the legislative history reflecting this intention and we have found nothing in our own research that does so.

The amendments were enacted as part of chapter 175 of the Statutes of 2007 in order to make "necessary statutory changes to implement the Budget Act of 2007 …." (Stats. 2007, ch. 175, § 38.) A report of the California Little Hoover Commission explains the budget impact. To settle a lawsuit brought on behalf of inmates of state juvenile facilities, the state entered into a consent decree in November of 2004. The cost of compliance with the consent decree proved to be high:

> "Realizing the state could not afford to comply with the … consent decree, in 2007, policy-makers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders. This major step had long been recommended by youth advocates and experts, and by this Commission in 1994 and 2005, as many counties had demonstrated they were more effective and efficient in managing and rehabilitating youth offenders." (Little Hoover Com., Juvenile Justice Reform: Realigning Responsibilities (July 2008) pp. i-ii <http://www.lhc.ca.gov/lhcdir/192/report192.pdf> [as of Oct. 15, 2008] (hereafter Juvenile Justice Reform).)

By transferring responsibility for some wards to county authorities, the state saved about $250,000 per ward per year. (Juvenile Justice Reform, *supra*, at pp. i, 6.) At the same time, the legislation compensated the counties for the additional wards for which they would be responsible under a formula based on a rate of $117,000 per ward per year. (§§ 1952, 1953, 1953.5, 1954.)

Amended sections 731 and 733 are the parts of this "realignment legislation" that limit the offenses for which juvenile courts can commit wards to state authorities. The commission's report is not, of course, an expression of intent by the Legislature, but it does provide helpful background tending to support the view that the amendments to sections 731 and 733 were motivated by a desire to reduce the cost and increase the effectiveness of juvenile confinement—not to mitigate the punishment for those juvenile offenses that are no longer eligible for DJF commitments.

Since the amendments do not mitigate punishment, we apply the default rule that statutes only operate prospectively. "A new or amended statute applies prospectively only, unless the Legislature clearly expresses an intent that it operate retroactively." (*People v. Ledesma* (2006) 39 Cal.4th 641, 664.) Amended section 733 states that it "shall be effective on and after September 1, 2007." An uncodified portion of the legislation states that portions including the amendments to sections 731 and 733 "shall become operative on September 1, 2007." (Stats. 2007, ch. 175, § 37.) There is no expression of any intent that the amendments operate retroactively.

N. D. relies on *People v. Benefield* (1977) 67 Cal.App.3d 51. There, the defendant was convicted as an adult and sentenced to state prison for crimes committed when he was a juvenile. (*Id.* at pp. 54-55.) While his appeal was pending, the Legislature changed the law to allow courts to remand these defendants to the Youth Authority before sentencing them to state prison, for the purpose of determining whether they were suitable for a Youth Authority commitment. (*Id.* at pp. 56-57.) Noting that the parties agreed that the new law would "benefit, and in effect impose a lighter punishment" on the defendant, the Court of Appeal held that the new law was applicable to the defendant under *Estrada*. (*Id.* at pp. 57-58.) N. D. argues that this shows the amendments to sections 731 and 733 are applicable to him because, like those amendments, the law at issue in *Benefield* affected only the defendant's placement, not the length of his confinement.

We do not believe the difference between confinement with DJF and confinement in a county facility is a mitigation of punishment even if the difference between state prison and DJF does constitute one. In any event, we decline to extend *Benefield* to cover this case.

N. D. also relies on a footnote in a dissenting opinion in *In re Pedro T.* (1994) 8 Cal.4th 1041, 1054, fn. 3 (dis. opn. of Arabian, J.). Justice Arabian stated that "[t]he rule of *Estrada* has not been limited to cases involving a mitigation of punishment but has

been invoked in a wide variety of circumstances ranging from complete or substantial decriminalization of conduct [citations] to modification of the trial court's discretionary authority [citations]." (*Ibid*.) As the present case does not involve any sort of decriminalization, we presume N. D. intends to rely on the notion of "modification of the trial court's discretionary authority." One of the two examples of this modification cited by Justice Arabian was an enactment allowing for alternative sentencing to county jail or state prison at the trial court's discretion, which was considered in *People v. Francis* (1969) 71 Cal.2d 66, 75. Since the new law in question there gave the trial court discretion to impose a county jail term of one year or less or a state prison term of one to 10 years, while the old law simply prescribed a term of one to 10 years in state prison, it seems to us that the new law did mitigate punishment by allowing a shorter sentence. (*Id.* at p. 75.) Justice Arabian's second example is a law "eliminating discretion to order forfeiture of bail and making discharge mandatory," as discussed in *People v. Durbin* (1966) 64 Cal.2d 474, 479. (*In re Pedro T., supra*, 8 Cal.4th at p. 1054, fn. 3.) The new law at issue prohibited forfeiture of bail in cases where the defendant was physically unable to appear because of death, illness, insanity, or detention by civil or military authorities. (*People v. Durbin*, *supra*, at p. 476.) The Supreme Court held that the rule of *Estrada* applied to this new law regardless of "whether the forfeiture of bail is considered a civil penalty or as akin to criminal punishment …." (*People v. Durbin*, *supra,* at p. 479.) Again, the reason why *Estrada* applied was that the new law reduced a sanction imposed on a defendant. As we have said, there is no reason to believe in this case that the Legislature limited the offenses for which DJF commitments may be imposed because it wished to reduce the sanctions imposed on juveniles committing other offenses. N. D.'s reliance on Justice Arabian's footnote therefore does not carry the day.

Finally, N. D. relies on the following language in *People v. Ledesma*, *supra,* 39 Cal.4th at page 664: "Application of a change in law that occurred after the crime took

place is retroactive only if it changes the legal consequences of a defendant's past conduct." N. D. says this means the amendments must be applied to him retroactively because they changed the legal consequences of his past conduct. He misunderstands the Supreme Court's point. The quoted passage from *Ledesma* is part of an explanation of the meanings of the terms "retroactive" and "prospective." Applying a new law in proceedings occurring after its passage *constitutes* retroactive application if the new law changes the legal consequences of the conduct. (If it does not—i.e., if the change is merely procedural—then applying it to the defendant does not constitute retroactivity even though the crime occurred before the new law became effective.) Whether a new law that changes the consequences of past conduct *should* be applied retroactively is a different question. Some changes—those, for instance, that criminalize previously permitted conduct—cannot be applied retroactively. Contrary to N. D.'s argument, therefore, *Ledesma* did not hold that every change in law that alters the legal consequences of conduct occurring before the change must be applied retroactively.

In holding as we do, we agree with the result in *In re Carl N.* (2008) 160 Cal.App.4th 423, but not with all of its reasoning. The court in that case gave two reasons for its holding that the amendments to sections 731 and 733 did not apply to a disposition still pending on appeal when the amendments took effect. First, it stated that section 731.1, which was enacted as part of the same legislation, "is essentially a nonretroactivity clause that applies to sections 731 and 733." (*In re Carl N., supra*, at p. 437.) We do not think section 731.1, which sets forth a procedure by which DJF commitments made under the old law can be recalled, expresses any clear intention about whether the new law applies to dispositions not yet final when the new law took effect. Second, the *Carl N.* court held: "[T]he statutes on which Carl relies—sections 731 and 733—do not address punishment or penalties for criminal offenses. Rather, they govern where a juvenile delinquent may serve time for purposes of rehabilitation." (*In re Carl N., supra*, 160 Cal.App.4th at p. 438.) We agree the amendments do not mitigate

punishment, but conclude *Carl N.* overstates the matter by saying they do not address punishment. The amendments address juvenile confinement, and the law acknowledges that punishment is or may be among the purposes of juvenile confinement, as long as it is consistent with the ultimate goal of rehabilitation. (§ 202, subds. (b), (e)(3)-(e)(5).)[3]

II. Section 731.1

The parties' briefs discuss the validity and impact of section 731.1, which provides:

> "Notwithstanding any other law, the court committing a ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, upon the recommendation of the chief probation officer of the county, may recall that commitment in the case of any ward whose commitment offense was not an offense listed in subdivision (b) of Section 707, unless the offense was a sex offense set forth in paragraph (3) of subdivision (d) of Section 290 of the Penal Code, and who remains confined in an institution operated by the division on or after September 1, 2007. Upon recall of the ward, the court shall set and convene a recall disposition hearing for the purpose of ordering an alternative disposition for the ward that is appropriate under all of the circumstances prevailing in the case."

Citing *In re Carl N., supra,* 160 Cal.App.4th 423, the People argue that section 731.1 shows that the *Estrada* rule is inapplicable because it is equivalent to a saving clause. N. D. argues that section 731.1 is unconstitutional because it violates the separation-of-powers doctrine, usurping the role of the judiciary by conditioning recalls on the probation officer's recommendation.

As we have said, we do not think section 731.1 is equivalent to a saving clause. The rule of *Estrada* is inapplicable for a different reason, as we have explained. Amended sections 731 and 733 therefore do not apply, and N. D.'s commitment was proper regardless of the validity or invalidity of section 731.1. Apart from its asserted

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[3]Another case cited by the People, *In re Brandon G.* (2008) 160 Cal.App.4th 1076, 1081, refused to apply amended sections 731 and 733 retroactively, but did not address the applicability of the *Estrada* rule.

impact on the validity of N. D.'s commitment, the issue of the constitutionality of section 731.1 has no bearing on this case. No proceeding under that section has taken place and the invalidation of the section would not affect N. D.'s commitment. We therefore will not reach the issue. (See *People v. Pantoja* (2004) 122 Cal.App.4th 1, 10 [principles of judicial self-restraint require us to avoid deciding case on constitutional grounds unless absolutely necessary].)

III. The court's exercise of discretion in imposing the DJF commitment

N. D. argues that the court abused its discretion in committing him to DJF. We disagree.

Under the law before it was amended, the juvenile court had discretion to commit a ward to DJF for any offense if the ward was 11 years old or older and not suffering from a contagious or dangerous disease. (§ 202, subd. (e); former §§ 731, 733.) Under the former and current law, the judge must be "fully satisfied" that the ward's mental and physical condition are "such as to render it probable" that the ward will benefit from the commitment. (§ 734.) It has often been stated that a DJF commitment should be made only in the most serious cases, that the record must contain evidence to support a finding that placement in a county facility will not accomplish the purposes of the law, and that the seriousness of the offense alone is not an appropriate basis for a DJF commitment. (See, e.g., *In re Michael R.* (1977) 73 Cal.App.3d 327, 334, 336, 340.) At the same time, the goals of protecting the public and punishing the ward can be a proper basis for the commitment if it will also provide rehabilitative benefits. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396-1397.) There is no requirement that a county placement be attempted first. (*In re John H.* (1978) 21 Cal.3d 18, 27.)

We review the commitment for abuse of discretion. (*In re Carl N., supra*, 160 Cal.App.4th at pp. 431-432; *In re Michael D., supra*, 188 Cal.App.3d at p. 1395.) We will not disturb the juvenile court's factual findings if they are supported by substantial evidence, and we must indulge all reasonable inferences from the facts properly found.

(*In re Michael D., supra*, at p. 1395.) The court abuses its discretion when it "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) We determine whether the court abused its discretion after examining the record in light of the purposes of the juvenile court law. (*In re Michael D., supra*, 188 Cal.App.3d at p. 1395.)

In addition to the burglary, drug possession, probation violations, and battery we have already described, the probation report discusses misbehavior N. D. engaged in while at the Juvenile Justice Campus. From January to April 2007, N. D. was returned to his unit from school for misbehavior three times. On one occasion, this was for "inappropriate behavior that made the female minors in the classroom feel as [though] they were being sexually harassed." He was twice disciplined for "[c]ausing a unit disruption"; in one of these instances he "became combative when staff attempted to enter his room."

At a disposition hearing on May 22, 2007, the court indicated it was inclined to commit N. D. to DJF despite the probation officer's contrary recommendation. It said, "I sort of have this policy in terms of striking another person while in custody that we have an obligation to protect the others, and that he sort of forfeits any consideration. However, he is at a stage three [a juvenile hall status designation], and that says well for him since this incident." Counsel for the People said, "It appears he's suffering from major bouts of depression that I don't know that [the Juvenile Justice Campus] is equipped to handle." The court continued the hearing to May 30, 2007, to find out if the district attorney would file new charges against N. D. relating to gang graffiti found in his room.

At the hearing on May 30, 2007, after N. D.'s counsel requested that the court follow the probation officer's recommendation for an additional commitment to the Juvenile Justice Campus, the court had the following discussion with counsel:

"THE COURT: I kind of have—I mean, I have—if you strike somebody at [the Juvenile Justice Campus], your rehabilitation takes a second seat to the need to protect the other kids. And this was, as I recall, a case where he just hit him blind-sided.

"MS. CALDERA [counsel for the probation department]: Your Honor, Probation also notices that his behavior in the [juvenile] hall hasn't been all that great either. There was an incident just yesterday involving him being uncooperative and having to be returned back to the unit from school. So the school administrator said they don't want him returned to the school in the Hall.

"THE COURT: Submit it?

"MR. IRWIN [counsel for the People]: Submit it.

"MS. OWEN [counsel for N. D.]: Submit it.

"THE COURT: I'll set the maximum period of confinement as based upon the following facts and circumstances, the offense involved great violence, great bodily injury, threat of great bodily injury, acts [displaying] a high degree of cruelty. Minor served prior [custodial] commitment. Minor was on probation when the crime was committed. Minor's prior performance on probation was unsatisfactory. Minor has no prior record or [insignificant] record of delinquent behavior. After weighing the facts and circumstances this Court will set maximum period of confinement for six years two months.

"MS. OWEN: Your Honor, is the Court going to be [imposing] the California Youth Authority?

"THE COURT: Yes, I am.

"MS. OWEN: The last time we were in court I have notes that [the] Court was going to go along with the recommendation unless Probation brings up a new charge. That new charge has not been filed for insufficient evidence. His behavior in Juvenile Hall may not be the best, but he is not picking up new charges. The arguments made last time—his criminal history is minimal. I do understand that he did strike somebody—

"THE COURT: He has been in boot camp, and he assaulted the other minor less than a month into his commitment. In addition, I was just told he's been kicked out of school because of his behavior. I mean, I don't think that we have anything for him. First of all, he poses a risk to the other

> kids. And you know, if I were looking at going to CYA, I'd kind of conform my behavior. He knew he was looking at it before. Why is he getting in trouble? I mean, if he would have stayed completely out of trouble there, it probably would have—you know, it would have been a closer call. But he got kicked out of school. What are we going to do with him, Liz?
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> "MS. OWEN: I understand.
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> "THE COURT: I mean, what am I going to do, you know? He's a risk to the other kids. He's not conforming his behavior at all, even when he knows that CYA is over his head. We don't have anything. We can't help him at this point in time. And I'm not willing to risk another kid at [the Juvenile Justice Campus] for him. I'm going to send him to CYA."

In light of the evidence and the court's findings, we cannot say the DJF commitment exceeded the bounds of reason. Less restrictive commitments had been attempted, but N. D. violated probation and reoffended. The court could reasonably determine that the goals of protecting the other wards and imposing appropriate punishment while providing N. D. with rehabilitative benefits would be better served by a DJF commitment than by a county placement.

N. D. asserts that he has "worsening mental health, educational, and past substance abuse problems" and that "the record was devoid of any evidence that [he] would be provided with any treatment at DJF or any after-care when he is paroled." He contends that at DJF, "the reformatory education the court found would benefit [him] is not going to occur" and he will probably instead receive "an education in greater criminality." These claims do not, however, amount to a showing that the court abused its discretion by finding in light of all the relevant considerations—including rehabilitation, public safety, and punishment—that a DJF commitment was superior to the alternatives.

Based on our holding, we do not discuss the People's argument that N. D.'s counsel's comments at the hearing failed to preserve the issue for appellate review.

DISPOSITION

The judgment is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Levy, J.

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Dawson, J.